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No. 91-781

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In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

A PARCEL OF LAND, BUILDINGS, APPURTENANCES AND
IMPROVEMENTS KNOWN AS 92 BUENA VISTA AVE-
NUE, RUMSON, NEW JERSEY, AND BETH ANN
GOODWIN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a person who receives a gift of money derived from drug trafficking, and uses that money to purchase real property, can assert an "innocent owner" defense to civil forfeiture of the real property under 21 U.S.C. 881(a)(6).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 937 F.2d 98. The opinions of the district court denying respondent Goodwin's motion for summary judgment (Pet. App. 17a-35a) and certifying certain questions for interlocutory appeal (Pet. App. 38a-45a) are reported, respectively, at 738 F. Supp. 854 and 742 F. Supp. 189.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1991. A petition for rehearing was denied on August 13, 1991. Pet. App. 46a-47a. The petition for a writ of certiorari was filed on November 12, 1991 and was granted on March 2, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 511 of the Controlled Substances Act of 1970, 21 U.S.C. 881, is reprinted in its entirety at Pet. App. 48a-57a. 21 U.S.C. 881(a)(6) provides:

The following shall be subject to forfeiture to the United States and no property right shall exist in them:

* * * * *

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of [21 U.S.C. 801-904], all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

21 U.S.C. 881(h) provides:

Vesting of title in United States

All right, title, and interest in property described in subsection (a) of this section shall

vest in the United States upon commission of the act giving rise to forfeiture under this section.

STATEMENT

This case arises from the government's attempt to enforce a civil forfeiture under 21 U.S.C. 881(a)(6) of a house located at 92 Buena Vista Avenue in Rumson, New Jersey. Respondent Beth Ann Goodwin purchased the house in 1982 with more than \$200,000 provided by her companion, Joseph Brenna, who lived with her in the house from 1982 to 1987. Both courts below found probable cause to believe Brenna obtained the purchase money through illegal drug transactions. Respondent claims, however, that she was unaware that Brenna was involved in drug-related activities or that the money was derived from drug dealing. The court of appeals held that respondent's claims, if proved, would support an "innocent owner" defense against forfeiture under 21 U.S.C. 881(a)(6). The government sought review in this Court, contending that, because respondent obtained her interest in the house after the events giving rise to forfeiture of the purchase money, she is not eligible to assert the innocent owner defense to forfeiture under Section 881(a)(6). This Court granted certiorari, 112 S. Ct. 1260 (1992).

1. Under 21 U.S.C. 881, assets that are used in, or derived from, drug trafficking are subject to forfeiture. In particular, Section 881(a)(6) authorizes the forfeiture of "proceeds traceable" to a drug transaction, including property purchased with drug proceeds.¹ A forfeiture mandated by Section 881 is en-

¹ Subsection (a)(6) was enacted in 1978 as an amendment to Section 511 of the Controlled Substances Act of 1970. See

forced by means of an *in rem* action against the assets in question.

Under the common law doctrine known as "relation back," see *United States v. Stowell*, 133 U.S. 1, 16-17 (1890), title to property subject to forfeiture under federal statute vests in the United States at the time of the act triggering the forfeiture, unless the statute indicates otherwise. See *Henderson's Distilled Spirits*, 81 U.S. (14 Wall.) 44, 56-57 (1871). Thereafter, the United States owns the property and no valid interest can pass to any other party, regardless of subsequent events or transactions. See *Stowell*, 133 U.S. at 17.

The relation back doctrine is codified in Sections 881(a) and 881(h) of the civil forfeiture statute. Section 881(h), which was added in 1984 as part of the Comprehensive Crime Control Act, Pub. L. No. 98-473, § 306, 98 Stat. 2051, provides that "[a]ll right, title, and interest in property described in" Section 881(a) "vest[s] in the United States upon commission of the act giving rise to forfeiture" (emphasis added). Section 881(a) states that "no property right shall exist" in property that belongs to the United States as the result of an act triggering forfeiture under its subsections.

Certain subsections of the civil forfeiture statute, including Section 881(a)(6), contain a proviso that

Psychotropic Substances Act of 1978, Pub. L. No. 95-633, § 301, 92 Stat. 3777. A Joint Explanatory Statement concerning the amendment, which appears at 124 Cong. Rec. 34,671 (1978), states that drug proceeds "would still be subject to forfeiture" even if "involved in intervening legitimate transactions," and that property that constitutes the proceeds of such transactions is forfeit "if there is a traceable connection [between] such property and the illegal exchange of controlled substances."

has come to be known as the "innocent owner" defense. Like Sections 881(a)(4) and 881(a)(7)—which authorize the forfeiture, respectively, of conveyances and real property used to commit drug offenses—Section 881(a)(6) provides that "no property shall be forfeited * * * to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." Since no one other than the United States can acquire a valid ownership interest in property after it becomes subject to forfeiture, it is the position of the government that the "innocent owner" defense can only be asserted by a claimant who acquired an interest in the property *before* commission of the act triggering the forfeiture.

2. a. The government commenced this action in 1989 by filing a verified complaint against the property at issue. J.A. 11-16. The complaint alleges that the property was purchased with money provided by Joseph Brenna; that those funds were proceeds traceable to illegal drug transactions; and that, consequently, the property is subject to forfeiture under 21 U.S.C. 881(a)(6). Finding probable cause to support the complaint, the district court issued a warrant authorizing seizure of the property. J.A. 18-21. Following seizure of the house, Goodwin has continued to occupy it under an occupancy/tenant agreement with the United States Marshals Service. C.A. App. 54a-55a.

Goodwin answered the complaint and asserted a claim to the property. J.A. 22-23. In motions to dismiss and for summary judgment, she argued, *inter alia*, that there was no probable cause to believe the property was purchased with proceeds of drug traf-

ficking and that she was an "innocent owner" of the property within the meaning of Section 881(a)(6). In support of her innocent owner defense, Goodwin asserted that she lived with Brenna from approximately 1981 through 1987 in an "intimate personal relationship," that he supported her and her children until the two separated in 1987, that he gave her the funds used to purchase the house as a gift, and that she had no knowledge that the money was derived from illegal drug transactions. J.A. 31-33; Pet. App. 22a.

b. The district court denied Goodwin's motions. Relying in part on the fact that a federal grand jury in the Southern District of Florida had indicted Brenna for drug offenses yielding proceeds in excess of \$25 million in cash, including the money used to purchase the property at 92 Buena Vista Avenue,² the court found probable cause to believe that the property was traceable to drug transactions. Pet. App. 21a. The court noted that a DEA agent had verified the allegations of the forfeiture complaint, that an informant had advised the government that the house was purchased with drug proceeds, and that neither Brenna nor Goodwin had filed income tax returns from 1978 through 1985. *Id.* at 21a-23a.

The court also observed that the money used to purchase the house had first passed through the hands

² The Florida indictment, returned in April 1990, charges Brenna with two counts of violating the Continuing Criminal Enterprise (CCE) statute (21 U.S.C. 848); one count of conspiring to import in excess of 1000 kilograms of marijuana (21 U.S.C. 963); and four counts of importing in excess of 1000 kilograms of marijuana (21 U.S.C. 952(a)). J.A. 34-40. Brenna was a fugitive until recently and has not yet been brought to trial.

of an accountant in the British Virgin Islands. The evidence before the court revealed that the accountant assigned his clients pseudonyms and code words to conceal their identities, made a practice of picking up money in St. Thomas and carrying it to Tortolla in the British Virgin Islands, and shredded all "waste-paper" on a daily basis. The accountant had assigned Brenna the pseudonym "Joseph Smith" and the phrase "Mohave is warm this time of year" to identify himself over the telephone. See Pet. 6. As the court summarized, the accountant testified in deposition that he had received \$470,000 in two cash deliveries from Brenna in 1982 and, on Brenna's instructions, had wired \$216,000 of that amount to a law firm in New Jersey; those were the funds used to purchase the property that the government seeks to forfeit in this case. *Id.* at 23a-24a.

The district court also rejected Goodwin's innocent owner defense. Noting that Goodwin had characterized the funds used to buy the house as a gift, the court held that "where, as here, the government has demonstrated probable cause to believe that property is traceable to proceeds from drug transactions, the innocent owner defense may only be invoked by those who can demonstrate that they are bona fide *purchasers for value*." Pet. App. 27a. In so holding, the court relied on the language of the statute, the analogous criminal forfeiture statute (21 U.S.C. 853(c)), principles of property law, and common sense. Pet. App. 28a-29a. The court explained that it was unlikely "that Congress intended for the innocent owner exception to permit a drug dealer to avoid the impact of the forfeiture statute by disbursing the proceeds from his drug transactions to 'innocent' friends,

family or other random recipients of the trafficker's benevolence." *Id.* at 29a.

c. On interlocutory appeal certified by the district court under 28 U.S.C. 1292(b), the Third Circuit reversed. Although the court agreed that there was probable cause to believe the property was traceable to drug transactions, Pet. App. 14a, it held that "Goodwin need not be a bona fide purchaser for value to raise an innocent owner defense pursuant to section 881(a)(6)." *Id.* at 8a. The court reasoned that the statute "speaks only in terms of an 'owner' and in no way limits the term 'owner' to a bona fide purchaser for value." *Id.* at 7a. Observing that the statute authorizing criminal forfeitures in drug cases expressly excludes property transferred to bona fide purchasers for value, the court inferred from the absence of a similar provision in Section 881 that Congress intended to omit any requirement that a claimant be a purchaser to qualify as an innocent owner under the statute. Pet. App. 7a-8a. In addition, the court expressed concern that the government's position would apply to purchasers of drug proceeds as well as donees, a result that the court thought would "emasculate the innocent owner defense," *id.* at 9a, and "contravene the express legislative intent that [courts] interpret 'owner' broadly." *Id.* at 7a. The government suggested rehearing en banc, which the court denied over the dissent of four of its members. *Id.* at 46a-47a.

SUMMARY OF ARGUMENT

1. This Court has long recognized that the innocence of the owner of property is no defense to civil forfeiture of that property through *in rem* actions under federal statute. See *Various Items of Personal Property v. United States*, 282 U.S. 577, 581 (1931); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683-684 (1974). Under the common law doctrine known as "relation back," title to property subject to forfeiture under federal statute vests in the United States at the time of the act triggering the forfeiture, unless the statute indicates otherwise. Thereafter, the United States owns the property and no subsequent transfer can give rise to a legally valid third-party interest, regardless of the innocence of the party acquiring the property. *Henderson's Distilled Spirits*, 81 U.S. (14 Wall.) at 56-57; *United States v. Stowell*, 133 U.S. at 16-17.

2. The relation back doctrine applies with full force to forfeitures under 21 U.S.C. 881(a)(6), which covers "proceeds traceable" to a drug transaction, including property purchased with drug proceeds. Sections 881(a) and 881(h) codify the common law doctrine of relation back in the civil forfeiture statute. Section 881(a) states that "no property right shall exist" in property that belongs to the United States as the result of an act triggering forfeiture under its subsections. Section 881(h), enacted after subsection (a)(6) was added to the statute, provides that "[a]ll right, title, and interest in property described in" Section 881(a) "vest[s] in the United States upon commission of the act giving rise to forfeiture" (emphasis added). The effect of applying the relation back doctrine codified in these provisions to forfeitures under Section 881(a)(6) is that the

government's claim to drug proceeds or assets used to facilitate a drug transaction vests upon commission of the act resulting in forfeiture and cannot be compromised by any subsequent transfer.

3. a. Section 881(a)(6) contains a proviso, known as the "innocent owner" defense, specifying that "no property shall be forfeited * * * to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." Congress's choice of the word "owner" to designate the category of individuals eligible to avoid forfeiture under Section 881(a)(6) makes the defense unavailable to parties acquiring interests in property after the event triggering forfeiture. Under the relation back doctrine, no one other than the United States can acquire a valid ownership interest in property after it becomes subject to forfeiture. Thus, no one who acquires property after forfeiture attaches can be an "owner" under the statute—innocent or otherwise.

b. The terms of the innocent owner defense in Section 881(a)(6) are consistent with precluding assertion of the defense by those, such as respondent Goodwin, who acquire the property after forfeiture attaches. Section 881(a)(6) permits an owner to avoid forfeiture "by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." By requiring the owner to prove that the acts giving rise to forfeiture took place without his knowledge or consent, the statute looks to the owner's state of mind *at the time the acts were committed*. By making contemporaneous knowledge or consent the only test of innocence, the statute permits a party

acquiring tainted property through a subsequent transfer to avoid forfeiture by showing that he had not previously encountered the offender and was unaware of the offense at the time it was committed, even if he learned of the offense subsequently but before acquiring the property. A drug dealer could circumvent forfeiture by later conveying property to a friend or relative who was not a party to the illicit activity but became aware of it afterwards and knew that the purpose of the transfer was to defeat forfeiture. This absurd result is avoided by recognizing that the defense in Section 881(a)(6) is, by its terms, available only to an "owner"—*i.e.*, one who acquired his interest prior to the illegal acts giving rise to forfeiture.

c. The court of appeals did not attempt to reconcile the relation back doctrine of Section 881(h) with the innocent owner defense of Section 881(a)(6), but rather concluded that the relation back doctrine simply does not apply to property covered by the innocent owner defense. That, however, is not what the statute says. Section 881(h) specifies that "[a]ll right, title, and interest in property described in subsection (a)" vests in the United States at the time of the illegal act. Property covered by the innocent owner defense of Section 881(a)(6) is "property described in subsection (a)." Therefore, the relation back doctrine applies to that property. If the terms of the innocent owner defense are met, the United States must relinquish the property, but application of the relation back doctrine ensures that only persons who owned the property before commission of the illegal acts giving rise to forfeiture can avail themselves of the innocent owner defense.

d. The government's construction of the innocent owner defense in Section 881(a)(6) is buttressed by the fact that Congress used very different words in other forfeiture statutes to create an exemption for property acquired by innocent third parties *after* the events leading to forfeiture. In the criminal forfeiture statute, 21 U.S.C. 853, Congress explicitly recognized that property "transferred to a person other than the defendant" after the illegal act occurs is subject to forfeiture, but nonetheless permitted a "transferee" to avoid forfeiture if he could establish that he was a bona fide purchaser for value and that, "at the time of purchase," he was "reasonably without cause to believe that the property was subject to forfeiture." 21 U.S.C. 853(c); see also 18 U.S.C. 1963(c). Implicitly recognizing that after-acquirors cannot be "owners" under the relation back doctrine, Congress used the term "transferee" in that statute to designate the class of subsequent bona fide purchasers entitled to claim the property. Also, in contrast with Section 881(a)(6), Congress made the test of "innocence" under Section 853(c) turn on whether the purchaser had reason to believe that the property was subject to forfeiture *at the time of purchase*. This criterion—and not the claimant's awareness of the acts giving rise to forfeiture at the time they were committed—is the one that Congress would be expected to adopt for persons receiving property after the events giving rise to forfeiture, because those persons may not acquire guilty knowledge of the tainted source of the assets until after those events occurred.

4. The unavailability of the innocent owner defense under subsection (a)(6) will not result in the confiscation of property in the hands of truly blameless parties. The harshness of statutory forfeiture is

tempered by administrative procedures for remission and mitigation promulgated by the Attorney General under authority granted in Section 881(d). The remission procedure is available to "any person interested" (19 U.S.C. 1618) in seized or forfeited property—a category that includes transferees of property that has already become subject to forfeiture. The regulations establish a simple and informal extrajudicial procedure by which bona fide purchasers or recipients of gifts of tainted assets can attempt to reclaim property by demonstrating that they were unaware of its involvement with illegal activities. 28 C.F.R. 9.5(b). Thus, a holding that the legal innocent owner defense to judicial forfeiture in Section 881(a)(6) is unavailable to persons who unknowingly receive gifts of drug proceeds would not deprive those persons of all opportunity to attempt to regain the property. Rather, it would simply require them to avail themselves of a different set of procedures for proving their ignorance of the drug transactions from which the property derives.

5. Extending the innocent owner defense to recipients of gifts of drug proceeds would undermine the effectiveness of civil forfeitures in the enforcement of federal drug laws. Congress has made clear that forfeitures play an essential role in efforts to eradicate drug trafficking. Permitting the "innocent owner" exception to be invoked by recipients of tainted property, even if ignorant of the source of their gifts, would undercut the effectiveness of forfeitures. Such a rule would enable drug dealers to realize benefits from their illegal activities by distributing their wealth to relatives, friends, and others with whom they seek to curry favor. As in this case, they could even enjoy the use of very valuable prop-

erty that they have given to their most intimate companions. In addition, this interpretation would encourage drug dealers to use nominees to conceal their assets, since even close associates of drug dealers can contend, as respondent Goodwin does here, that they were unknowing recipients of gifts of drug proceeds. By transferring assets to third persons, drug traffickers can seriously impede the government's efforts to obtain forfeiture of assets that are demonstrably traceable to drug transactions.

ARGUMENT

RESPONDENT GOODWIN CANNOT INVOKE THE INNOCENT OWNER DEFENSE UNDER SECTION 881(a)(6) TO AVOID FORFEITURE OF PROPERTY PURCHASED WITH THE PROCEEDS OF A DRUG TRANSACTION

A. No Party Other Than The United States Can Obtain An Ownership Interest In Property After The Events Giving Rise To Civil Forfeiture Under Federal Statute

1. The concept of forfeiture traces its origin to the English common law practice of confiscating "deodands", which were objects that caused the death of human beings. Since, in the eyes of the common law, the object was the guilty party, it was irrelevant whether the person to whom the offending res belonged was innocent of any wrongdoing. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 (1974).

Although "[d]eodands did not become part of the common-law tradition of this country," *Calero-Toledo*, 416 U.S. at 682, colonial courts regularly exercised jurisdiction *in rem* to enforce English and local forfeiture statutes against commodities and vessels used in violation of customs and revenue laws. Laws providing for forfeiture of property involved in crim-

inal activity were among the earliest statutes enacted by Congress. See, e.g., Act of July 31, 1789, ch. 5, §§ 12, 36, 1 Stat. 39, 47 (forfeiture of ships and cargoes involved in customs offenses); Act of Aug. 4, 1790, ch. 35, §§ 12-16, 22, 27-28, 67, 1 Stat. 157-159, 161, 163-164, 176 (same); *C. J. Hendry Co. v. More*, 318 U.S. 133, 139, 145-148 (1943); *Boyd v. United States*, 116 U.S. 616, 623 (1886); *Calero-Toledo*, 416 U.S. at 682-683.

Consistent with these historical origins, civil forfeiture under federal statute is effected through actions *in rem*, with the tainted object named as the defendant and treated as the offender. As the Court explained in *Various Items of Personal Property v. United States*, 282 U.S. 577, 581 (1931), "[i]t is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient." Accordingly, not only has conviction of the owner for a crime never been a prerequisite to civil forfeiture, but, in interpreting early forfeiture statutes, this Court uniformly rejected as a defense the innocence of the owner of the property subject to forfeiture. *Calero-Toledo*, 416 U.S. at 683-684, citing *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14-15 (1827) (conviction for piracy is not prerequisite to forfeiture of ship engaged in piratical aggression); *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210, 233 (1844) (forfeiture of ship engaged in piracy upheld where owner's innocence was "fully established"). Forfeitures have been held effective even against an innocent owner who leased, lent, sold on condition of future payment, or otherwise entrusted his property to the wrongdoer, without knowledge of, or involvement in, the acts working a forfeiture. See,

e.g., *Dobbins's Distillery v. United States*, 96 U.S. 395, 401 (1878) (innocent lessor); *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 510-511 (1921) (innocent lienor); see also *United States v. One Ford Coupe Automobile*, 272 U.S. 321, 332-333 (1926); *General Motors Acceptance Corp. v. United States*, 286 U.S. 49, 57 (1932).

2. For nearly two centuries, this Court has interpreted forfeitures under federal statutes to take place at the moment of illegal use, unless the statute provides otherwise.³ At that instant, all rights and legal title to the property pass to the United States. Although this aspect of the common law rule is referred to as "relation back," that term is something of a misnomer: the judicial forfeiture proceedings simply confirm or proclaim that the forfeiture took place at the time of illegal use. See *United States v. 1960 Bags of Coffee*, 12 U.S. (8 Cranch) 398, 405 (1814) ("the commission of the offence marks the point of time on which the statutory transfer of right takes place"); *Gelston v. Hoyt*, 16 U.S. (3 Wheat.) 245, 311 (1818) ("forfeiture must be deemed to attach, at the moment of the commission of the offence, and, consequently, from that moment, the title of the plaintiff would be completely divested [*sic*]").

Moreover, this Court has repeatedly held that once property becomes subject to forfeiture, title vests in

³ See *Caldwell v. United States*, 49 U.S. (8 How.) 366, 381 (1850) (distinguishing between statutes that provide for forfeiture upon the doing of an act, in which case title relates back to the time of the act, and statutes that allow an election as to what property will be forfeited, in which case the forfeiture occurs at the time of the election); *United States v. Grundy & Thornburgh*, 7 U.S. (3 Cranch) 337, 352-354 (1806) (same).

the government absolutely: no subsequent transfer can give rise to a legally valid third-party interest in the property. In *United States v. Stowell*, 133 U.S. at 16-17, applying "the settled doctrine" that "the forfeiture takes effect immediately upon the commission of the act" giving rise to forfeiture, this Court explained that "the right to the property then vests in the United States * * * and avoids *all intermediate sales and alienations, even to purchasers in good faith*" (emphasis added).

The Court has consistently adhered to this principle in interpreting a wide variety of forfeiture statutes. In *United States v. 1960 Bags of Coffee*, 12 U.S. (8 Cranch) 398 (1814), the Court rejected a contention by bona fide purchasers of coffee that a forfeiture under the Non-Intercourse Act of March 1, 1809, ch. 24, 2 Stat. 528, took effect only when the property in question was seized and condemned. The Court explained that "the commission of the offence marks the point of time on which the statutory transfer of right takes place," rejecting the notion that "by a sale, it is put in the power of an offender to purge a forfeiture." 12 U.S. (8 Cranch) at 405. See also *United States v. The Brigantine Mars*, 12 U.S. (8 Cranch) 417 (1814) (affirming a seizure and forfeiture of a ship in the hands of an innocent bona fide purchaser on "the principle established in [*1960 Bags of Coffee, supra*]"); *Henderson's Distilled Spirits*, 81 U.S. (14 Wall.) at 56-58 (affirming the "rule * * * of this court for more than half a century," that "it is not in the power of the offender or former owner to defeat the forfeiture by any subsequent transfer of the property even to a bona fide purchaser for value without notice of the wrongful acts done and committed"); *Thacher's Distilled Spirits*, 103

U.S. 679, 682 (1880) (government's title to "tainted" property "attaches at once and may be pursued by the government whenever and in whose hands soever that property may be found").

This historic principle was recently reaffirmed in *Caplin & Drysdale v. United States*, 491 U.S. 617, 627 (1989). In that case, the Court noted that the criminal drug forfeiture statute, 21 U.S.C. 853(c), "reflects the application of the long-recognized and lawful practice of vesting title to any forfeitable assets, in the United States, at the time of the criminal act giving rise to forfeiture." The Court went on to observe that it was neither "extraordinary [n]or novel" to conclude that the owner of property at the point that it becomes subject to forfeiture "cannot give good title to such property to [someone who acquires it from him] because he [does] not hold good title." 491 U.S. at 627.

B. No Party To Whom Forfeitable Assets Have Been Transferred Following Commission Of The Act Giving Rise To Forfeiture Under 21 U.S.C. 881(a)(6) Is Entitled To Assert An Innocent Owner Defense

1. The relation back doctrine applies to forfeitures under Section 881(a)(6)

As this Court made clear in *Henderson's Distilled Spirits*, 81 U.S. (14 Wall.) at 57, the relation back doctrine applies to federal statutes authorizing forfeiture unless the statute's language "show[s] a different intent." That interpretive rule comports with the broad principle that "[s]tatutes which invade the common law * * * are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Isbrandtsen Co. v. Johnson*, 343

U.S. 779, 783 (1952). See also *Astoria Federal Sav. & Loan Ass'n v. Solimino*, 111 S. Ct. 2166, 2169-2170 (1991); *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl Protection*, 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.").

When Section 881(a) was amended in 1978 by adding subsection (a)(6), see Psychotropic Substances Act of 1978, Pub. L. No. 95-633, § 301, 92 Stat. 3777, the statute did not explicitly address the timing of forfeiture. Under the rule in *Henderson's Distilled Spirits*, therefore, the relation back doctrine applies with full force, and the government's claim to drug proceeds or assets used to facilitate a drug transaction under that section vests at forfeiture and cannot be compromised by any subsequent transfer.

As originally enacted in 1970, see Pub. L. No. 91-513, Tit. II, § 511, 84 Stat. 1276, Section 881(a) stated that "no property right shall exist" in items forfeited to the United States. In 1984, six years after Section 881(a)(6) was added to the statute, Congress enacted Section 881(h), which clarified the vesting of rights to property in the United States "upon commission of the act giving rise to forfeiture."⁴ Section 881(h), in conjunction with the just-

⁴ See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 306, 98 Stat. 2050-2051. In the same enactment, Congress amended the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 U.S.C. 1963) and the criminal forfeiture statute governing property involved in drug offenses (21 U.S.C. 853) to eliminate confusion over whether the relation back doctrine applies in criminal forfeiture proceedings. As the legislative history explains, Congress

quoted language of Section 881(a), makes clear that forfeitures under Section 881(a)(6) fall within the interpretive rule of *Stowell*: all private rights in property subject to forfeiture under that provision are automatically and irreversibly terminated by the acts giving rise to the forfeiture, and no one can subsequently acquire ownership of the property. Since subsequent transfers to other persons do not pass good title, an owner who has lost all of his interest in drug-related proceeds by reason of a forfeiture may not reverse or avoid the forfeiture and divest the United States of its "right, title, and interest" in the property, by the simple means of a purported conveyance to a new "owner." As codified in these statutory provisions, the principle of relation back leaves no room for the creation of an interest in drug proceeds by means of a later transfer.

thought that the relation back doctrine, which it acknowledged to be the settled rule for civil forfeiture, should apply under the criminal forfeiture statutes:

The problem of pre-conviction dispositions of property subject to criminal forfeiture is further complicated by the question of whether, simply by transferring an asset to a third party, a defendant may shield it from forfeiture. *In civil forfeitures, such transfers are voidable, for the property is considered "tainted" from the time of its prohibited use or acquisition.*

S. Rep. No. 225, 98th Cong., 2d Sess. 196 (1984) (emphasis added).

In simultaneously adding Section 881(h) to the civil forfeiture statute, Congress acknowledged that the relation back principle codified in Section 881(h) was already "well established" in the law and that it applied to civil forfeitures under Section 881(a). S. Rep. No. 225, *supra*, at 215. Perhaps to foreclose any negative implication from express incorporation of the relation back doctrine into the criminal forfeiture statutes, Congress codified the rule in the civil forfeiture statute as well.

2. *Because the house claimed by respondent Goodwin was purchased with drug proceeds after those proceeds became the property of the United States, she is not an "owner" entitled to assert an "innocent owner" defense under Section 881(a)(6)*

a. Section 881(a)(6) carves out a limited exception to the forfeiture of property falling within its scope for "innocent owners": specifically, it provides that no property shall be forfeited to the extent that the "owner" demonstrates that he neither knew of, nor consented to, the commission of the acts giving rise to forfeiture. Like the "innocent owner" exceptions created by identical language in Sections 881(a)(4) and 881(a)(7), the exception to forfeiture under subsection (a)(6) indisputably applies to individuals who owned the seized assets before those assets were ever tainted by involvement in drug transactions. Although a party who acquired a valid ownership interest before the event giving rise to forfeiture would ordinarily be divested of that interest once the triggering event took place, he is nonetheless entitled to contest forfeiture by demonstrating ignorance of the illegal transaction.

Section 881(a)(6), however, does not state that forfeited property may not be taken from any person who receives it without knowledge of its involvement in a drug crime. On the contrary, the statutory exception is expressly limited to the interests of innocent owners:

no property shall be forfeited under this paragraph, *to the extent of the interest of an owner*, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

21 U.S.C. 881(a)(6) (emphasis added). A party to whom property is conveyed *after* it became subject to

forfeiture—at which point title to the property vested in the United States under 21 U.S.C. 881(h)—never possesses or acquires a valid ownership interest, because the relation back doctrine prevents the original owner from passing any valid interest to a third party. In the words of Section 881(h), “[a]ll right, title, and interest” in the property vested in the United States “upon commission of the act giving rise to forfeiture.” Because the original owner previously lost any right or interest in the property, the new possessor is not an “owner” under the statute—innocent or otherwise—and cannot assert the innocent owner defense to forfeiture under Section 881(a)(6). See *In re One 1985 Nissan, 300ZX* [Nissan], 889 F.2d 1317 (4th Cir. 1989); *Eggleston v. Colorado*, 873 F.2d 242, 245-248 (10th Cir. 1989), cert. denied, 493 U.S. 1070 (1990).⁵ Congress’s choice of the word

⁵ In *Nissan*, *supra*, the government sought civil forfeiture of more than \$1,000,000 in cash and other drug proceeds found at the residence of Alvin White, a deceased drug dealer. The Fourth Circuit unanimously rejected the contention that the deceased’s heirs were “innocent owners” within the meaning of 21 U.S.C. 881(a)(6). The court explained that, under the relation back doctrine, the dealer “could not have given good title to anyone while living, including his children,” so he also could not pass any interest in the property after his death. The court added that “neither White’s personal representative nor his children had any claim to any interest in White’s property prior to the acts of White which gave rise to forfeiture, and for that reason the innocent owner provision of the statute provides no relief for them.” 889 F.2d at 1321.

Similarly, in *Eggleston v. Colorado*, *supra*, the Tenth Circuit held that the State of Colorado was not an innocent owner of drug proceeds by virtue of sales tax liens that arose only after the offenses triggering the forfeiture of that property.

“owner” to designate the category of individuals eligible to avoid forfeiture under Section 881(a)(6) makes the defense unavailable to parties acquiring interests in property after the event triggering forfeiture.

b. The terms of the innocent owner defense in Section 881(a)(6) are consistent with application of the relation back doctrine to preclude assertion of the defense by those who claim an interest in the property that was acquired after forfeiture attaches. Section 881(a)(6) permits an owner to avoid forfeiture “by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.” By requiring the owner to prove that the acts giving rise to forfeiture took place without his knowledge or consent, the statute looks to the owner’s state of mind *at the time the acts were committed*. However, the party acquiring tainted property through a transaction occurring after the events triggering forfeiture will not necessarily have been in a position to know of, or consent to, the illegal transactions from which the proceeds derive. Thus, if respondent is correct that the “innocent owner” defense is available to a party acquiring tainted property through a subsequent transfer, that party would be able to establish his innocence under the statute if he showed that he had

873 F.2d at 245-248. The court explained that “[t]he innocent owner exception applies only to owners whose interest vests prior to the date of the illegal act that forms the basis for the forfeiture.” *Id.* at 248. The defense was not available where title to the drug proceeds in question “vested in the United States through forfeiture prior to any ownership interest held by the State.” *Ibid.*

not previously encountered the offender and was unaware of the offense at the time it was committed, even if he later learned of the offense before acquiring the property. Logically, an act that is "committed * * * without the knowledge" of a person remains so even if he subsequently learns of its commission. With respect to a person who acquires property after the forfeitable offense, however, it makes no sense to permit that person to establish his innocence if he was ignorant of the offense when it occurred, but learned of it some time before receiving the property. By making contemporaneous knowledge or consent the only test of innocence, the statute would permit a drug dealer to circumvent forfeiture by conveying property to a friend or relative who was not a party to the illicit activity but became aware of it afterwards and knew that the purpose of the transfer was to defeat forfeiture.⁶

⁶ The district court in *United States v. One Parcel of Real Property*, 743 F. Supp. 103, 106 (D.R.I. 1990), made a similar point in rejecting the innocent ownership claim of a subsequent transferee of tainted real property under 21 U.S.C. 881(a) (7), which contains the same innocent owner exception:

It is clear that the "knowledge or consent" test contained in § 881(a) (7) was intended to assess the "innocence" of a person who owned the premises at the time the offense was committed. Since such an owner presumably exercised some control over the property, it makes sense to determine forfeitability in terms of that owner's complicity or lack of complicity in the illegal activity.

The court further explained that "Congress could not have intended" that the innocence of subsequent transferees "be measured solely by the 'knowledge or consent' test." Rather, "[a] post delicto transfer of the property raises an additional issue bearing on the 'innocence' of the new owner, namely, whether that owner purchased the property in good faith."

A variation on the facts of this case illustrates the point that the test of innocence in Section 881(a) (6) cannot sensibly be applied to the category of persons claiming to have acquired ownership after the events giving rise to forfeiture. Suppose that Brenna bought the house with drug proceeds before he even knew Goodwin; that Goodwin later met him, learned of his illegal drug business, moved in with him, and acquired the house as a gift from Brenna. On those facts, the house would be subject to forfeiture by virtue of acts and omissions occurring before Goodwin knew Brenna—and, if Goodwin qualifies as an "owner," those acts and omissions would seem to have been "committed or omitted without the knowledge or consent of that owner." The way to avoid that obviously untenable result is to recognize, consistent with the relation back doctrine, that a person claiming an after-acquired interest in drug proceeds is not an "owner" whose knowledge or consent is relevant to the forfeitures mandated by Section 881(a) (6).⁷

743 F. Supp. at 106. The court pointed out, *ibid.*, that Congress knew how to incorporate that more appropriate test for assessing the "innocence" of persons acquiring the property after forfeiture attaches: the criminal forfeiture statute, 21 U.S.C. 853(c), requires the new owner to "demonstrate that he *purchased* the property in good faith * * * and without knowledge or notice of the government's claim" (emphasis added). See pp. 30-35, *infra* (discussing criminal forfeiture statute).

⁷ Of course, it might be possible to avoid this result by applying the common law principle that notice of a prior claim to property bars the transfer of good title even as to a bona fide purchaser for value. See, e.g., Restatement of Restitution § 172 (1937) (bona fide purchaser takes good title to encumbered property if he is without notice of prior claims). On this theory, anyone who is aware at the

It is also unlikely that the statute's nonconsent requirement was meant to apply to an after-acquiror, since a person would not ordinarily have occasion to grant or withhold consent to an offense involving property before that person gained any interest in the property. It is even less likely that retroactive consent would be requested, given, or withheld at any time after the offense. Since Congress could not have intended the innocent owner defense to apply to circumstances in which the statutory test makes no meaningful distinction, it must be concluded that the defense does not apply to a person whose claim to ownership arises only after the commission of the offense that is the basis of forfeiture.

If the statute were intended to cover claimants receiving the property post-delicto, it naturally would have looked to the state of mind of the party seeking to block forfeiture at the time the forfeitable property changes hands and is acquired by the claimant. The most likely explanation for Section 881(a)(6)'s focus on the claimant's contemporaneous knowledge

time of transfer that the property is, or was purchased with, drug proceeds could be excluded from the category of "owner" because, in the forfeiture context, knowledge of the "taint" would be tantamount to notice of the government's prior claim to the property.

But even if extra-statutory principles could be invoked to avoid the untenable consequences of applying the contemporaneous knowledge test to after-acquired property, it would still be difficult to explain why Congress would choose that test in this context, instead of focusing on the claimant's awareness of the "taint" at the point that the forfeitable property is acquired—as it did when it expressly provided for a defense of lack of knowledge at the time of purchase for subsequent transferees with respect to criminal forfeiture. See pp. 34-35, *infra*, and note 6, *supra*.

of the acts that are the basis of the forfeiture is that the "knowledge or consent" test was intended to assess the innocence of a person who owned the property at the time the offense was committed. That test is consistent with an innocent owner exception designed to restore ownership to a limited class of claimants who acquired ownership of the property prior to the acts giving rise to forfeiture and neither knew of nor consented to the illegal use of the property.⁸

⁸ In a concurring opinion in *Nissan*, 889 F.2d at 1322, Judge Murnaghan suggests that reading Section 881(a)(6) to bar assertion of the innocent owner defense by all subsequent transferees is "impossible to square" with providing for the forfeiture of "proceeds traceable to * * * an exchange" of controlled substances because it is not possible to "obtain drug deal proceeds before the transaction even takes place" (emphasis omitted). Judge Murnaghan goes astray in assuming that assets covered by Section 881(a)(6) can only be claimed under the innocent owner exception if those assets acquired their "taint"—and, thus, their character as "proceeds"—before the claimant acquired the interest that is the basis for asserting the defense. It is possible for funds to be entrusted to persons who subsequently use them to engage in drug transactions without the owner's knowledge or consent. For example, a sum of money might be turned over to a friend for investment on the promise of a large profit. If that money was "invested" in cocaine without the owner's permission, and the proceeds deposited in a bank account subsequently seized by the government, the investor would be entitled to assert an innocent owner defense to the forfeiture of the account to the extent of his original investment. Thus, contrary to Judge Murnaghan's conclusion, Section 881(a)(6) provides relief to an important class of property owners: nonparticipants in a drug transaction whose property is exchanged for drugs or otherwise used to facilitate the transaction.

c. The court of appeals in this case recognized that the "innocent owner" defense creates an exception to the relation back doctrine, but read the exception far too broadly by wholly suspending the doctrine before determining the scope of the exception. The court noted that "Section 881(h) vests title in the United States *in that property described in subsection (a)*," Pet. App. 8a, and reasoned that property "described in [that] subsection" does *not* include property that subsection (a) excepts from forfeiture in the innocent owner proviso. In effect, the court decided "first [to] ascertain whether the property at issue is not forfeitable because of an innocent owner defense" and only then to "apply[] section 881(h)." *Id.* at 8a-9a. On the court's reading, Section 881(h) never reaches property that is later acquired by an individual innocent of the acts giving rise to forfeiture, and title to that property never vests in the United States.

The Third Circuit's reading of the statute is not a natural one. The innocent owner defense in Section 881(a)(6) does not provide—as the court of appeals would have it—that property covered by the defense is somehow not "property described in subsection (a)." On the contrary, property covered by the defense plainly is included in "property described in subsection (a)": subsection (a)(6) speaks of "*all* * * * things of value" exchanged for a controlled substance, and "*all* proceeds traceable to such an exchange." The subsection then goes on to provide that such property shall nonetheless be exempt from forfeiture if the owner can demonstrate innocence.

Furthermore, if the property covered by the innocent owner defense were not "property described in subsection (a)" in the first instance, there would of

course be no need to specify that, if the prerequisites to assertion of the defense are satisfied, the property shall not be forfeited. The relation back doctrine in Section 881(h), by its terms, covers all "property described in subsection (a)," including property so described that is nonetheless exempted from forfeiture because of the innocent owner defense. In concluding otherwise, the Third Circuit, in effect, read Section 881(h) as if it referred to "property subject to forfeiture under subsection (a)" rather than "property described in subsection (a)."

The court's analysis also ignores the timing of Section 881(h)'s application. Section 881(h) operates on the "property described in subsection (a)" at the time that property acquires its "taint"—not at the time it is later conveyed to a third party. At the time that Section 881(h) operates to vest title in the United States, a person in respondent Goodwin's position has not even acquired the interest that would be the basis for asserting the innocent owner defense in a later adjudication of forfeiture. The point of Section 881(h) is that it prevents the acquisition of a valid ownership interest that would be the basis for asserting such a defense by vesting title in the United States and precluding that title from passing to any third party.⁹

⁹ For example, in this case, the government has established probable cause to believe that the money Brenna transferred to Goodwin was derived from drug dealing. If it was, that money was, at the point of Brenna's unlawful acts, "property described in" Section 881(a), and the United States acquired "all right, title, and interest" to it. Under the Third Circuit's view, however, the very same property would cease to be "property described in" Section 881(a) at the moment that it was transferred to someone without knowledge of Brenna's illegal activities, and the title previously conferred on the

In sum, the Third Circuit's analysis completely nullifies the purpose and effect of Section 881(h): to grant broad title to the United States at the point when property is involved in an illegal drug transaction, and to make clear that *no* subsequent transfers can ever pass good title. Under the Third Circuit's construction, however, property on which Section 881(h) has already operated can be pulled outside the statute retroactively by a transfer to an innocent third party. The upshot is that what is in plain statutory language an unqualified grant of "all right, title, and interest" to drug proceeds at the point of a drug offense is nullified, retroactively, thereby effectively stripping that provision of its meaning. That interpretation does not represent a plausible accommodation of the innocent owner defense and the relation back provision. Cf. *American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 U.S. 402, 421 (1983) (statutes should not be construed so as to impute to Congress "a purpose to paralyze with one hand what it sought to promote with the other").

d. This construction of the innocent owner defense in Section 881(a)(6) is buttressed by the fact that Congress used very different words in other forfeiture statutes to create an exemption for property acquired by innocent third parties *after* the events leading to forfeiture. In 1984, six years after Section

United States would be revoked. If the property were returned to Brenna at a later point, the Third Circuit would presumably hold that the property was again subject to the relation back provision and that the government's title had been restored. A statute that on its face grants unqualified title to specified property at a given point in time cannot reasonably be construed to embody such an in-again, out-again conception of ownership.

881(a)(6) was added to the civil forfeiture statute, Congress revised the criminal forfeiture statute by enacting 21 U.S.C. 853, which provides for forfeitures of drug-related assets on the basis of criminal convictions. See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 303, 98 Stat. 2044-2049 (§ 413); *United States v. Monsanto*, 491 U.S. 600 (1989); *Caplin & Drysdale v. United States*, *supra*; see also note 4, *supra*. To resolve uncertainty over whether the relation back doctrine—which originated in the civil context—would carry over to criminal forfeitures, see S. Rep. No. 225, 98th Cong., 2d Sess. 196 (1984); note 4, *supra*, Congress included a relation back provision in the criminal forfeiture statute, 21 U.S.C. 853(c).¹⁰ That provision

¹⁰ Section 853(c) provides:

All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

The language of Section 853(c) is identical to the criminal forfeiture provision of RICO, see 18 U.S.C. 1963(c), which was also enacted as part of the Comprehensive Crime Control Act of 1984. See S. Rep. No. 225, *supra*, at 200-201.

Section 853(n)(6) of the criminal forfeiture statute, which deals with third-party interests in property subject to forfeiture, expressly distinguishes, in subsections (6)(A) and (6)(B), between parties with a "legal right, title, or interest" superior to that of the defendant "at the time of the commission of the acts which gave rise to the forfeiture"—a group that would correspond to "owners" under the civil forfeiture

explicitly recognized that property "transferred to a person other than the defendant" after the illegal act occurred was also subject to forfeiture, but nonetheless permitted a transferee to avoid forfeiture if he could establish that he was a bona fide purchaser for value and that, "at the time of purchase," he was "reasonably without cause to believe that the property was subject to forfeiture."

The contrast between this provision and Section 881(a)(6) is revealing. First, in permitting some after-acquirors to block forfeitures under Section 853(c), Congress chose *not* to designate that group as "owners," implicitly recognizing that, if "[a]ll right, title, and interest * * * vests in the United States upon the commission of the act giving rise to forfeiture," subsequent acquirors cannot fall into that category. Rather, since such after-acquired property belongs to the United States, Congress used the term "transferee" to designate the class of subsequent bona fide purchasers entitled to claim the property.¹¹

statute—and parties claiming the property as bona fide purchasers without notice who acquire the property after the "commission of the [unlawful] acts," as described in the "transferee" exception in 853(c). The absence of a requirement in the criminal forfeiture statute that a claimant in the "owner" category prove innocence can be explained by the *in personam* nature of criminal forfeiture proceedings. See note 11, *infra*.

¹¹ The court of appeals apparently assumed (Pet. App. 6a-9a) that Congress must have intended the exception for innocent owners in Section 881 to extend at least as far as the exception for bona fide purchasers in Section 853. Whether by oversight or design, however, the civil relation back provision, 21 U.S.C. 881(h), does not explicitly exempt any class of subsequent transferees of forfeited property.

While Congress did not directly explain why it added express protection for some transferees to one statute but not

the other, fundamental differences between civil and criminal forfeiture suggest a possible explanation. Because criminal forfeitures are relatively new in federal law and are imposed through an *in personam* procedure as a form of punishment against a person convicted of a crime, the exception for bona fide purchasers in Section 853 was probably intended to ensure that this criminal sanction visits hardship on the convicted defendant and not others unlikely to be involved in the offense or in sheltering the defendant's property. See S. Rep. No. 225, *supra*, at 208 ("Criminal forfeiture is an *in personam* proceeding * * * reach[ing] only property of the defendant, save in those instances where a transfer to a third party is voidable."). That rationale does not necessarily apply to civil forfeitures, which have always regarded the property as the "offender." Such forfeitures have for centuries proceeded through actions *in rem* that take no account of the conduct of the owner. See pp. 15-18, *supra*; see also 1 D. Smith, *Prosecution and Defense of Forfeiture Cases* ¶¶ 2.01-2.04 (1991) (civil forfeitures *in rem*); 2 *id.* at ¶ 13.01 (criminal forfeitures *in personam*).

Whatever the explanation for the different language in the criminal and civil statutes, the fact that the 1984 Congress failed to include an express exception for transferees in the civil context does not show that six years earlier Congress intended to exempt *all* innocent transferees—including recipients of gifts like respondent—from civil forfeitures. Likewise, there is no indication that the 1984 Congress intended to exempt from civil forfeiture property—such as gifts to third parties—that was clearly subject to criminal forfeiture. To the contrary, the 1984 committee report expresses the view that all transfers of "tainted" property by drug offenders were "voidable" in civil forfeiture proceedings and indicates that Section 853(c) was intended to produce the same result in the criminal context, with an exception for bona fide purchasers. See S. Rep. No. 225, *supra*, at 196, 200-201, 211-212. (As discussed below, at pp. 35-41, the possibility that property that is exempt from criminal forfeiture by virtue of a transfer to a bona fide purchaser will be subjected to civil forfeiture is more hypothetical than real.)

The facts of this case also illustrate why it is important that civil forfeitures be available even for property that is

Second, in contrast with Section 881(a)(6), the test of "innocence" under Section 853(c) is whether the purchaser had reason to believe that the property was subject to forfeiture *at the time of purchase*. As already explained, this is the criterion that Congress would be expected to adopt for persons acquiring their interest in property after the events giving rise to forfeiture, because those persons may not learn of the tainted source of the assets until sometime after the events occurred. However, Section 881(a)(6) focuses on the owner's awareness of the acts giving rise to forfeiture at the time the acts were committed—a state of mind that, as a practical matter, may be independent of a subsequent transferee's guilty knowledge of the tainted character of the property.

In short, the language employed by Congress in Section 881(a)(6) does not accomplish the purpose later effected in Section 853(c): to provide protection for subsequent "innocent" transferees of forfeitable assets. Congress did not use the word "transferee" or any equivalent expression in Section 881(a)(6), nor did it expressly furnish a broader definition of

subject to criminal forfeiture. Until recently, Brenna was a fugitive and could not be tried. Likewise, if a criminal defendant dies, any prosecution against him abates, and civil proceedings may be the only remaining means of enforcing a forfeiture of drug proceeds belonging to the deceased offender. See *United States v. Oberlin*, 718 F.2d 894, 896 (9th Cir. 1983); but see *United States v. Mollica*, 849 F.2d 723, 726 (2d Cir. 1988) (refusing to decide whether criminal forfeiture abates with death). In some cases, civil forfeitures also enable the government to establish title to drug-related assets without awaiting the completion of criminal proceedings.

the term "owner" than would properly apply in a statute incorporating the relation back doctrine. Instead, Congress used the "innocent owner" language that also appears in Sections 881(a)(7) and 881(a)(4), under which the exception is "most commonly claimed by someone who allows a third party to use their automobile, boat, aircraft or real property, only to 'discover' that the third party has used their property to facilitate an illegal drug transaction." *United States v. One Single Family Residence*, 683 F. Supp. 783, 786 (S.D. Fla. 1988). It is reasonable to infer that Congress intended the parallel exception under Section 881(a)(6) to be claimed by owners of property in an analogous situation, not by parties acquiring property after forfeiture attaches.¹²

C. A Person Acquiring Property Purchased With Drug Proceeds May Seek Equitable Remission Of Forfeiture Under Section 881(d)

The court of appeals in this case took as its starting point the district court's ruling that bona fide purchasers of assets subject to forfeiture are entitled to

¹² Respondent seeks to undermine the government's reading of Section 881(a)(6) by relying on remarks made on the floor of both houses of Congress by sponsors of the amendment that became Section 881(a)(6). Br. in Opp. 2-3; see also Pet. App. 7a (citing Joint Explanatory Statement accompanying enactment of the Psychotropic Substances Act of 1978, *supra*, for the proposition that the term "owner" should be construed "broadly"). Even if the floor debates might suggest that some legislators were of the opinion that the new provision proposed for enactment would protect some individuals acquiring drug proceeds after the forfeiture took effect, the words that Congress actually incorporated into the statute plainly belie that impression. In such circumstances, the words of the statute must control.

seek shelter as innocent owners under Section 881 (a)(6). In concluding that Congress intended the exception to reach all "owners" regardless of how the property was acquired, the court of appeals appears to have been swayed by concern that denying innocent owner status to the recipient of a gift would necessarily deny innocent owner status to bona fide purchasers as well. Pet. App. 9a.¹³

¹³ Relying in part on legislative history, some courts have suggested that the innocent owner defense is at least available to bona fide purchasers for value of property that has previously been involved in drug transactions. See *United States v. One Single Family Residence Located at 6960 Miraflores Ave.*, 731 F. Supp. 1563, 1568 (S.D. Fla. 1990), appeal dismissed, 932 F.2d 1433 (11th Cir. 1991), cert. granted on other issues *sub nom. United States v. Republic Nat'l Bank*, No. 91-767 (Feb. 24, 1992); *United States v. One Single Family Residence*, 683 F. Supp. at 787-788; see also *Nissan*, 889 F.2d at 1322 (Murnaghan, J., concurring). Concern for bona fide purchasers, however, would not support an exception for all after-acquired interests in drug-related property. Permitting recipients of gifts of drug proceeds to assert innocent ownership would undercut the statute to a far greater extent than an exception for bona fide purchasers. Drug traffickers could shelter their assets by giving them to friends and relatives while still retaining some degree of enjoyment and control. See pp. 42, *infra*. This case is a good example: Brenna lived in the house he gave to his companion, Goodwin, for five years. Also, in contrast with donations, genuine arm's-length transactions often generate "derivative proceeds"—the property the drug dealer receives in exchange for the drug proceeds—that are available for forfeiture to the government. This case concerns only the recipient of a gift of drug proceeds. It is therefore unnecessary for the Court to decide in this case whether a bona fide purchaser of property representing drug proceeds could seek to block a forfeiture under Section 881(a)(6).

The court of appeals' concerns are greatly overstated. As this Court has previously observed, the harshness of statutory forfeiture has traditionally been tempered through administrative procedures for remission and mitigation: "Since 1790 the Federal Government has applied the ameliorative policy * * * of providing administrative remissions and mitigations of statutory forfeitures in most cases where the violations are incurred 'without willful negligence' or an intent to commit the offense." *Calero-Toledo*, 416 U.S. at 689-690 n.27. In keeping with this policy, Section 881(d) grants the Attorney General discretion to remit civil forfeitures of drug related assets by incorporating by reference the provision for equitable remission and mitigation of forfeitures under the customs laws, codified at 19 U.S.C. 1618.¹⁴ The

¹⁴ Section 1618 states, in pertinent part:

Whenever any person interested in any [item] seized under the provisions of this chapter * * * files * * * a petition for the remission or mitigation of such * * * forfeiture, the * * * Commissioner of Customs, if he finds that such * * * forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such * * * forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto.

Section 881(d) provides that the duties imposed on customs officers under the customs provisions incorporated by reference "shall be performed with respect to seizures and forfeitures of property under this subchapter" by persons designated by the Attorney General. In the case of forfeitures under Section 881(a), these responsibilities are delegated to the Director of the Asset Forfeiture Office of the Criminal Division of the Department of Justice. See 28 C.F.R. 9.3(d).

remission procedure is available in lieu of (or, in appropriate cases, in addition to) claims for judicial remission, and can be invoked either before or after the adjudication of forfeiture. Compare 21 C.F.R. 1316.76, 1316.78 (judicial forfeiture) and 21 C.F.R. 1316.79 (authorizing petition for remission of judicial forfeiture to the Attorney General); see also *United States v. Wood*, 851 F.2d 185, 188 (8th Cir. 1988) (reviewing "two avenues" for relief from forfeiture); 2 D. Smith, *Prosecution and Defense of Forfeiture Cases* ¶ 15.02 (1991) (reviewing equitable remission and mitigation procedures). In addition, money from the Assets Forfeiture Fund is available to compromise and pay valid liens and mortgages on forfeited property and to make payments to innocent persons in connection with the remission and mitigation of forfeitures. 28 U.S.C. 524(c)(1)(D) and (E); see S. Rep. No. 225, *supra*, at 217.

By the terms of the statute authorizing remissions, see 19 U.S.C. 1618, "any person interested" in seized or forfeited property is eligible to petition the Attorney General for return of the property. See also 21 C.F.R. 1316.79 (authorizing petition for remission by "[a]ny person interested in any property which has been seized, or forfeited * * * by court proceedings"). That designation is far broader than the category of "owner" entitled to assert the Section 881(a)(6) innocent owner defense. Accordingly, the regulations promulgated to implement the equitable remission authority permit the Attorney General to remit a forfeiture on the strength of a showing that the petitioner "has a valid, good faith interest in the seized property as owner or otherwise," 28 C.F.R. 9.5(b)(1) (emphasis added).

The remission regulations are primarily designed to ensure that innocent bona fide purchasers for

value—that is, persons who purchase tainted assets through the ordinary course of business, without any reasonable means of knowing of the transferor's illegal activities or the government's prior claim—can reclaim property seized by the government under the civil forfeiture laws. The regulations establish a simple and informal administrative procedure that relieves eligible claimants of the burden and expense of participating in judicial forfeiture proceedings.¹⁵ The regulations make special provision for general creditors, lienholders, lessors, and other holders of bona fide interests in seized property. See 28 C.F.R. 9.6. Moreover, the government has recently established a policy of expedited forfeiture settlement for mortgage holders. See United States Dep't of Justice, *Expedited Forfeiture Settlement Policy for Mortgage Holders* (July 1991). In keeping with the policy underlying those provisions, federal law enforcement authorities do not, as a matter of practice, pursue forfeiture of property in the hands of bona fide purchasers for value who would ordinarily be expected to lack notice of the government's prior claim.¹⁶

¹⁵ The regulations additionally provide that, to qualify for remission, the petitioner must show (1) that he lacked knowledge that the property at issue "was or would be involved in any violation of the law," (2) was unaware of the particular violation giving rise to the forfeiture, (3) took "all reasonable steps to prevent the illegal use of the property," and (4) did not know that the user of the property had any record of violating the law. 28 C.F.R. 9.5(b). Even if a petitioner cannot satisfy these criteria, mitigation of forfeiture may be granted for "extenuating circumstances," or to "avoid extreme hardship." 28 C.F.R. 9.5(c).

¹⁶ It has been suggested that, if the innocent owner exception of Section 881(a)(6) is construed not to cover property acquired after it is subject to forfeiture, it might be unconstitutional under *Calero-Toledo v. Pearson Yacht Leasing Co.*,

The category of persons eligible to apply for remission is not limited to bona fide purchasers or to

supra. See, e.g., *United States v. One Single Family Residence Located at 6960 Miraflores Ave.*, 731 F. Supp. at 1569. In *Calero-Toledo*, 416 U.S. at 689-690, the Court stated in dictum that

it would be difficult to reject the constitutional claim of * * * an owner who proved not only that he was uninformed in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property: for in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.

This dictum, by its terms, is concerned with the situation covered by the innocent owner defense as we construe it—where “an owner”—i.e., one whose interest antedates the illegal use resulting in forfeiture—does all that could be expected “to prevent the proscribed use of his property.” Even assuming that this dictum were relevant in the circumstances of this case, however, there would be no need to reject the government’s interpretation of the innocent owner defense in Section 881(a)(6) to avoid an unconstitutional result. In assessing whether a claimant has been deprived of his constitutional rights under the forfeiture statute, Section 881(a)(6) cannot be considered in isolation. Rather, a claimant must first avail himself of all available procedures for the return of his property before it can be determined whether he has been deprived of the property in an unconstitutional manner. See, e.g., *Williamson County Regional Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 190-191 (1985); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986). Thus, even if a claimant satisfying the *Calero-Toledo* criteria would be ineligible for relief from forfeiture under Section 881(a)(6), that provision would not be invalid if relief were available under the procedures for remission authorized by Section 881(d). In fact, the criteria established by the Attorney General for equitable remission in regulations implementing that section precisely track the *Calero-Toledo* requirements.

“owners” as that term is used in Section 881(a), so a person in respondent Goodwin’s position would also be eligible to invoke the procedure for equitable remission.¹⁷ Thus, a holding that the legal innocent owner defense to judicial forfeiture in Section 881(a)(6) is unavailable to persons receiving gifts of drug proceeds would not deprive those persons of all opportunity to attempt to regain forfeited property by proving their innocence of the drug transactions from which the property derives. Rather, it would simply require those persons to avail themselves of procedures that are authorized under a different statutory section.

D. Extending The Innocent Owner Defense To Recipients Of Gifts Of Drug Proceeds Would Undermine The Effectiveness Of Civil Forfeitures In The Enforcement Of Federal Drug Laws

Congress has made clear that forfeitures play an essential role in efforts to eradicate drug trafficking. The reasoning underlying the overhaul of drug forfeiture statutes in 1984, see S. Rep. No. 225, *supra*, at 191, is no less compelling today:

Today, few in the Congress or the law enforcement community fail to recognize that the traditional criminal sanctions of fine and impris-

¹⁷ In addition to filing a claim in district court to defend against judicial forfeiture of the property at issue in this case, see J.A. 22-23, respondent Goodwin filed a petition for remission and mitigation of judicial forfeiture, J.A. 31-33, which received consideration by the Asset Forfeiture Office under the regulations implementing Section 881(d). The Asset Forfeiture Office informs us that the petition was denied by the Director on October 4, 1991, on the ground that respondent Goodwin had not satisfactorily established that she lacked knowledge that the property was or would be involved in any violation of the law.

onment are inadequate to deter or punish the enormously profitable trade in dangerous drugs which, with its inevitable attendant violence, is plaguing the country. Clearly, if law enforcement efforts to combat racketeering and drug trafficking are to be successful, they must include an attack on the economic aspects of these crimes. Forfeiture is the mechanism through which such an attack may be made.

The Third Circuit's decision, unless reversed, will undercut the effectiveness of that critical remedy by enabling drug dealers to realize benefits from their illegal activity.¹⁸ The principal purpose of the forfeiture laws is to strip those who engage in drug trafficking of their "undeserved economic power." *Caplin & Drysdale*, 491 U.S. at 630. Money has value to a drug dealer, like anyone else, in part because it can be given away. Even if courts could reliably limit the innocent owner defense to donees who were in fact ignorant of the source of their gifts, the Third Circuit's interpretation would allow drug dealers to distribute their wealth to minor children, other unknowing family members, companions, and others with whom they seek to curry favor. Following Brenna's lead, they could even enjoy the use of very valuable property that they have given to their most intimate companions.

¹⁸ Moreover, this Court has acknowledged that the government has a "pecuniary interest in forfeiture that goes beyond merely separating a criminal from his ill-gotten gains." *Caplin & Drysdale*, 491 U.S. at 629. This interest "extends to recovering all forfeitable assets, for such assets are deposited in [the Department of Justice Assets Forfeiture] Fund[,] which supports law-enforcement efforts "in a variety of important and useful ways." *Ibid.* See 28 U.S.C. 524(c).

Furthermore, the Third Circuit's interpretation will encourage drug dealers to use nominees to conceal their assets. It is not difficult for even close friends or relatives of a drug trafficker to contend, as Goodwin does here, that they were unknowing recipients of gifts of drug proceeds—and it is difficult to assemble evidence rebutting such a claim. By placing title to drug proceeds in another person, therefore, a drug trafficker can erect a serious obstacle in the way of the government's efforts to obtain forfeiture of assets that are demonstrably traceable to drug transactions.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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